INTERFERENCE WITH CONTRACTS AND BUSINESS IN NEW YORK.

THE immediate results of an intentional interference with the contracts or business of another may be to entice away servants, or to induce the breach, the termination without breach, or the non-formation of contracts. The means by which these results may be accomplished may be either unlawful or lawful. And the motive for seeking to accomplish them may be either unjustifiable or justifiable.

We have then to consider, in any discussion of this tort, the result, the means, and the motive. No doubt seems to exist in any jurisdiction as to the necessity of considering means; doubts have frequently been expressed as to the necessity or propriety of considering motive; a very few jurisdictions make no distinction as to results, considering no one of the above results any more wrongful than the others. In New York it is probably unnecessary to make any distinction as to results; it is always necessary to distinguish as to means; it is probably necessary to distinguish as to motives where only lawful means are used.

Intentionally to produce any of the above results and consequent damages by the use of unlawful means, is itself unlawful whatever the motive. Intentionally to produce any of the above results and consequent damages by the use of lawful means, is probably unlawful if the motive be unjustifiable, but is certainly lawful if the motive be justifiable.

I. *Results of Interference with Contracts.* In New York no distinction is to be made between contracts of service and other contracts, or between inducing the breach of contracts and inducing the termination or non-formation of them. The only doubt that may be said to exist in this respect is as to whether the enticement of servants stands on any different footing from the interference with the performance of other contracts.

The early cases in New York recognize the common law remedy for the enticing away or harboring of servants with knowledge of

the relation,[1] and some later cases have also adverted to the rule.[2] But the modern decisions have been mainly hostile to the acceptance of such a doctrine in the case of contract servants.[3] It is probably safe to say that the old common law tort of enticing away such servants has been entirely assimilated to the tort of interference with contracts generally, leaving, of course, the question of servants by status untouched. It may, however, require an explicit decision of the Court of Appeals to set the matter entirely at rest.

Inducing the breach of an enforceable contract obligation is not unlawful if no unlawful means be used. This was so stated in the case of Ashley *v.* Dixon.[4] One Patrick had contracted to sell land to the plaintiff, and plaintiff contracted to sell the same land to the defendant. Subsequently, by offering Patrick more than the plaintiff's contract called for, the defendant induced Patrick to sell and convey the land to him. The court first holds that there is not sufficient evidence of a "conspiracy," or that "Patrick absented himself from home, or refused to perform his contract at the instigation of the defendant," and then says:

"But even if defendant had induced Patrick not to perform his contract, that alone would not make him liable to the plaintiff for damages. He could advise and persuade Patrick not to convey the land, and could, by offering more, induce him to convey to himself, without incurring any liability to plaintiff, so long as he was guilty of no fraud or misrepresentation affecting plaintiff. If A has agreed to sell property to B, C may at any time before the title has passed induce A not to let B have the property, and to sell it to himself, provided he be guilty of no fraud or misrepresentation, without incurring any liability to B; A alone, in such case, must respond to B for the breach of the contract, and B has no claim upon or relations with C. While, by the moral law, C is under obligation to abstain from any interference with the contract between A and B, yet it is one of those imperfect obligations which the law, as administered in our courts, does not undertake to enforce."

[1] Scidmore *v.* Smith (1816), 13 Johns. (N. Y.) 322; Stuart *v.* Simpson (1828), 1 Wend. (N. Y.) 376. See also Woodward *v.* Washburn (1846), 3 Den. (N. Y.) 369.

[2] Haight *v.* Badgeley (1853), 15 Barb. (N. Y.) 499; Caughey *v.* Smith (1872), 47 N. Y. 244; Buffalo Lubricating Oil Co. *v.* Everest (1886), 3 How. Pr. N. S. 179; Davis Machine Co. *v.* Robinson (1903), 41 N. Y. Misc. 329.

[3] Johnston Harvester Co. *v.* Meinhardt (1880), 60 How. Pr. (N. Y.) 168; Rogers *v.* Evarts (1891), 17 N. Y Supp. 264; Foster *v.* Retail Clerks' Protective Ass'n (1902), 39 N.Y. Misc. 48; other cases cited herein where inducing employees to quit is held non-actionable.

[4] (1872) 48 N. Y. 430 To the same effect is Daly *v.* Cornwell (1898), 34 N. Y. App. Div. 27. In the case of Hoefler *v.* Hoefler (1896), 12 N. Y. App. Div. 84, it was held actionable to induce one who had been ordered to pay alimony to the plaintiff not to pay it and to leave the State.

It is interesting to note, first, that neither Lumley *v.* Gye[1] nor Walker *v.* Cronin[2] is referred to by the court nor, apparently, by the counsel, and, second, that Ashley *v.* Dixon itself has never been cited by the New York Court of Appeals and but rarely by the inferior New York courts.[3] While the question of means is expressly referred to in this case the question of motive is left obscure. There seems to be in the mind of the court, however, some recognition of the idea that the inducing of the breach may be justified by the motive of competition for this particular land.

It is, of course, too clear for discussion that if it is non-actionable to induce the breach of a contract, it is non-actionable to induce the termination or non-formation of a contract where no unlawful means are used.[4]

Whether inducing even by unlawful means the non-formation of contracts is an actionable wrong might involve a preliminary question as to the substantial character of the plaintiff's right not to be interfered with. It has been held that merely intercepting even by unlawful means an intended gratuity or an expectation of benefit, is not unlawful.[5] Whatever may be thought of a contract terminable at will, certainly the possibility or probability of being able to bring about new contracts is a mere expectancy. If logic were to prevail, we might be forced to the conclusion that intercepting by unlawful means the expectation of forming contracts is non-actionable. But even in the leading case,[6] where it was held non-actionable to induce a testator by false and fraudulent representations to change his will to the damage of the plaintiff, it was recognized that the loss of a gratuity or the loss of prospective customers affords a substantial basis for an action for slander. The court says: "If this description of special damage is to be regarded as the gist and foundation of the action (of slander), I

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[1] (1853) 2 E. & B. 216.

[2] (1871) 107 Mass. 555.

[3] It is cited in support of the proposition that the law does not enforce moral obligations in 25 N. Y. St. Rep. 284 and 10 N. Y. Misc. 355. It is cited and applied to similar facts in Daly *v.* Cornwell (1898), 34 N. Y. App. Div. 27. It is to be noted that Ashley *v.* Dixon was decided by the temporary "Commission of Appeals" and not by the regular Court of Appeals. The contract in this case and in Daly *v.* Cornwell seems to have had no relation to a business or occupation.

[4] Johnston Harvester Co. *v.* Meinhardt (1880), 60 How. Pr. (N. Y.) 168, s. c. 9 Abb. New Cas. (N. Y.) 393; cases cited under III. Lawful Means, *infra.*

[5] Hutchins *v.* Hutchins (1845), 7 Hill (N. Y.) 104; Braem *v.* Merchants' Bank (1891), 127 N. Y. 508, aff'g 6 N. Y. Supp. 846; Hurwitz *v.* Hurwitz (1894), 10 N. Y. Misc. 353.

[6] Hutchins *v.* Hutchins, *supra.*

rather think the principle should be regarded as peculiar to that species of injury. . . . But the law applicable to the cases referred to proceeds upon the ground that the plaintiff, by the wrongful act complained of, has been deprived of the present actual enjoyment of some pecuniary advantage. No such damage can be pretended here. At best, the contemplated gift was not to be realized till after the death of the testator, which might not happen until after the death of the plaintiff; or the testator might change his mind, or lose his property."

Without discussing the question of interfering with a mere expectancy, the courts have uniformly held that interfering with the probable formation of contracts stands upon the same footing as interfering with the performance of contracts already formed. If it is actionable to induce a breach of contract it is equally actionable to induce the non-formation of one in New York, provided the means or the motive be the same in both cases. Thus there is no distinction in this respect between contracts of service and other contracts, nor between those in which the obligations are fixed and enforceable and those which carry with them no enforceable obligations or which still rest merely in expectation. Whether a distinction is to be made between an isolated or independent contract and one related to a business or occupation seems not to have been considered, but the cases in which it has been held actionable to interfere by lawful means have all involved the obstruction of a business or occupation.

II. *Unlawful Means.* It is unlawful to induce the breach of a contract by unlawful means. This was adjudged in an early case in which a contract of tenancy having yet eleven months to run was broken by the tenants because, it was alleged, the defendant with intent to damage the plaintiff threatened to seize the tenant's goods unless they would depart the premises and so disturbed the tenants that they abandoned the possession.[1] It was urged in this case that the damage was due to the wrongful act of the tenants in breaking the contract, and that the plaintiff's remedy was solely against them; but the court held that there was also an action against the defendant for the damages intentionally inflicted by him through the unlawful disturbance of the tenants.

It is unlawful to induce the termination of a contract (without breach) by the use of unlawful means. This is dealt with in two

[1] Aldridge *v.* Stuyvesant (1828), 1 Hall (N. Y.) 210.

cases in which the contract so terminated was unenforceable under the Statute of Frauds. In the first[1] the defendants by false representations induced the other party to believe that the plaintiff did not intend to perform, and were thereby enabled to sell their own goods in place of the plaintiff's. The court held it to be immaterial whether the contract was binding upon the buyer or not, since he would have fulfilled it but for the false and fraudulent representations of the defendants. This case was followed by a later case in which the contract was unenforceable under the Statute of Frauds, and the defendant by a false telegram led the seller to believe that the plaintiff would not perform.[2] So it is also unlawful to induce another's employees to leave his service by threats, intimidation, or force.[3]

It is unlawful to induce the non-formation of contracts by unlawful means. It is actionable to induce a plaintiff's customers to refrain from dealing with him by circulating false statements as to his goods or patents and threatening customers with infringement suits,[4] or by a general boycott involving threats and intimidation,[5] or by circulating a false statement that he is insane.[6] It is actionable to prevent persons from entering a plaintiff's employment by force, threats, and intimidation.[7] But the unlawful act must be the proximate cause of the damage.[8] Cases involving unfair competition by imitation of trade marks and trade names need not be considered in this discussion.

Whether particular conduct amounts to intimidation is, of course, a conclusion of fact to be gathered from all the circumstances. "There may be cases where persuasion and entreaty are not lawful instruments to effect the purposes of a strike. Even persuasion

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[1] Benton *v.* Pratt (1829), 2 Wend. (N. Y.) 385.

[2] Rice *v.* Manley (1876), 66 N. Y. 82.

[3] Davis *v.* Zimmerman (1895), 91 Hun (N. Y.) 489.

[4] Lubricating Oil Co. *v.* Standard Oil Co. (1886), 42 Hun (N. Y.) 153.

[5] Matthews *v.* Shankland (1898), 25 N. Y. Misc. 604; Sun Printing and Pub. Ass'n *v.* Delaney (1900), 48 N. Y. App. Div. 623. (In both these cases injunctions *pendente lite* were granted.) But a boycott not involving unlawful means is not unlawful. Mills *v.* U. S. Printing Co. (1904), 91 N. Y. Supp. 185.

[6] Green *v.* Davis (1903), 83 N. Y. App. Div. 216. See also Trapp *v.* Du Bois (1902), 76 N. Y. App. Div. 314 (libel).

[7] Davis *v.* Zimmermann (1895), 91 Hun (N. Y.) 489; Beattie *v.* Callanan (1901), 67 N. Y. App. Div. 14, aff'd 82 N. Y. App. Div. 7; Herzog *v.* Fitzgerald (1902), 74 N. Y. App. Div. 110. (Injunctions granted.)

[8] McDonald *v.* Edwards (1897), 20 N. Y. Misc. 523; Davis *v.* United Engineers (1898), 28 N. Y. App. Div. 396 (*semble*).

and entreaty may be used in such a manner, with such persistency, and with such environments, as to constitute intimidation. . . . Whenever the strikers assume toward the employee an attitude of menace, then persuasion and entreaty, with words however smooth, may constitute intimidation."[1] "It should be remembered that to constitute intimidation it is not necessary that there should be any direct threat, still less any actual act of violence. It is enough if the mere attitude assumed by the defendants is intimidating. And this may be shown by all the circumstances of the case, by the methods of the defendants, their circulars, their numbers, their devices."[2] Intimidation or coercion is not to be implied from the threat to do that which it is lawful for those making the threat to do, as to cause a general strike,[3] or to withdraw custom.[4]

Picketing is not *per se* an unlawful means. Since one may use persuasion for justifiable ends he may use it near the entrance to another's place of business as well as elsewhere. Unless he commits a trespass, or obstructs access to a place of business, he may station himself in front of another's store or factory for the purpose of persuading workmen or customers not to deal with that other, and may do this either by oral persuasion or by the distribution of circulars.[5] The early decision[6] that picketing and placarding constitute a nuisance must be regarded as no longer law.[7]

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[1] Rogers *v.* Evarts (1891), 17 N. Y. Supp. 264.

[2] Foster *v.* Retail Clerks' Protective Ass'n (1902), 39 N. Y. Misc. 48.

[3] National Protective Ass'n *v.* Cumming (1902), 170 N. Y. 315, 328–330. But see argument to contrary in dissenting opinion. "When persuasion ends and pressure begins the law is violated." "A threat with ruin behind it may be as coercive as physical force." In Coons *v.* Chrystie (1898), 24 N. Y. Misc. 296, it was held that it was coercion for a labor union officer to order members of the union to strike since the members were under fear of a penalty for disobedience, but this has not been suggested in any subsequent decision. In Reynolds *v.* Plumbers' Protective Ass'n (1900), 30 N. Y. Misc. 709, aff'd 53 N. Y. App. Div. 650, it was held that even where members were liable to expulsion for dealing with plaintiff this did not amount to coercion.

[4] Park & Sons Co. *v.* Nat. Druggists' Ass'n (1903), 175 N. Y. 1, 20.

[5] Rogers *v.* Evarts (1891), 17 N. Y. Supp. 264; Kerbs *v.* Rosenstein (1900), 56 N. Y. App. Div. 619; Levy *v.* Rosenstein (1900), 66 N. Y. Supp. 101; Foster *v.* Retail Clerks' Protective Ass'n (1902), 39 N. Y. Misc. 48; Mills *v.* U. S. Printing Co., 91 N. Y. Supp. 185, where, however, it is suggested that annoyance or interruption of the peaceful traveler may render picketing unlawful. The decision that pickets were unlawful in Davis Machine Co. *v.* Robinson (1903), 41 N. Y. Misc. 329, was simply equivalent to the decision that persuasion was unlawful because the motive was unjustifiable. In Park & Sons Co. *v.* Nat. Druggists' Ass'n, 175 N. Y. 1, spying upon plaintiff's business to discover who furnished him with goods in breach of agreement was held not unlawful.

[6] Gilbert *v.* Mickle (1846), 4 Sandf. Ch. (N. Y.) 357.

[7] Foster *v.* Retail, etc., Ass'n, *supra*.

Boycotting is not *per se* an unlawful means, and becomes such only when carried out by violence, intimidation, or coercion. "A may refuse to trade with B, unless B changes his policy, and A may think that his attitude is necessary to his own welfare and protection. . . . If A may take this step it does not seem logical to hold that A and C together may not, and may not, by argument, persuasion, and entreaty, bring D and E to their side. If A, C, D, and E cannot do what A alone may lawfully do, the vice must be in the combination. But there is no dissent in our highest courts over the proposition in National Protective Ass'n *v.* Cumming that, 'whatever one may do alone he may do, with others, provided they have no wrongful object in view.' . . . I think that the verb 'to boycott' does not necessarily signify that the doers employ violence, intimidation, or other unlawful coercive means, but that it may be correctly used in the sense of the act of a combination in refusing to have business dealings with another until he removes or ameliorates conditions which are deemed inimical to the members of the combination, or some of them, or grants concessions which are deemed to make for that purpose. And as such a combination may be formed and held together by argument, persuasion, entreaty, or by the 'touch of nature,' and may accomplish its purpose without violence or other unlawful means, *i. e.*, simply by abstention, I think it cannot be said that *to boycott* is to offend the law." [1]

Combinations to do what one may lawfully do introduce no new element of unlawfulness. "Whatever one may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act." [2] "A conspiracy is an agreement to do an unlawful act or to do a lawful act by unlawful means. There can be no conspiracy if the act aimed at is lawful and if the means employed also are lawful. Two or more persons may agree to do what each one of them may lawfully do." [3] Hence combined persuasion or combined picketing and persuasion or combined boycott is not unlawful means, and becomes so only when accompanied by threats

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[1] Mills *v.* U. S. Printing Co., 91 N. Y. Supp. 185. See also Sinsheimer *v.* United Garment Workers, 77 Hun (N. Y.) 215; Foster *v.* Retail Clerks' Protective Ass'n, 39 N. Y. Misc. 48.

[2] National Protective Ass'n *v.* Cumming, 170 N. Y. 315, 321, aff'g 53 N. Y. App. Div. 227, 236. See also Mills *v.* U. S. Printing Co., *supra.*

[3] Foster *v.* Retail Clerks' Protective Ass'n, 39 N. Y. Misc. 48, 57.

to do an unlawful act or the actual doing of an unlawful act. Probably the numbers involved would be a circumstance to be considered in determining whether a menacing attitude has been assumed, but not a controlling circumstance. "Picketing may be done in such numbers as to constitute intimidation."[1] It is also probable that motive may be a more important, or at least a more difficult, question in the case of combinations than in the case of a single actor, since a combination may, and often does, include persons whose relation to the end sought is remote.

If the combination constitutes a criminal conspiracy, whether under the Penal Code or under the Anti-Monopoly Act, it is of course illegal, and its acts causing damage to another have been done by unlawful means. Down to 1870 it had been held a criminal conspiracy at common law for workmen to combine to prevent one from working for less than the rate fixed by the combination by imposing penalties of any sort upon the recalcitrant,[2] or to procure the discharge of a workman because he did not belong to defendants' union.[3] From 1830 this was so held under the provisions of the Revised Statutes making it an indictable conspiracy for two or more persons to conspire to commit any act injurious to trade or commerce,[4] a provision continued and enlarged in the Penal Code of 1882.[5] But by the act of 1870,[6] it was provided that this section of the Revised Statutes "shall not be construed to restrict or prohibit the orderly and peaceable assembling or cooperation of persons employed in any profession, trade, or handicraft, for the purpose of securing an advance in the rate of wages or compensation, or for the maintenance of such rate." This has been construed not to warrant a combination to drive a workman out of employment for any reason not connected with the rate of wages,[7] or to warrant coercion or intimidation in any matter connected with the rate of wages.[8]

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[1] Rogers *v.* Evarts, 17 N. Y. Supp. 264, 269.

[2] People *v.* Melvin (1810), 2 Wheel. (N. Y.) 262, s. c. Yates, Sel. Cas. 112; People *v.* Fisher (1835), 14 Wend. (N. Y.) 9; Master Stevedores' Ass'n *v.* Walsh (1867), 2 Daly (N. Y.) 1.

[3] People *v.* Trequier (1823), 1 Wheel. (N. Y.) 142.

[4] R. S. Pt. IV., Ch. I. tit. 6, § 8; subd. 6; People *v.* Fisher, *supra.*

[5] Penal Code, § 168.

[6] L. 1870, c. 19 (now § 170 of Penal Code).

[7] People *v.* Walsh (1888), 15 N. Y. St. Rep. 17; People *v.* Smith, 10 N. Y. St. Rep. 730, s. c. 5 N. Y. Cr. Rep. 509.

[8] People *v.* Kostka (1886), 4 N. Y. Cr. Rep. 429; People *v.* Wilzig (1886), 4 N. Y. Cr. Rep. 403.

Combinations to fix the price of commodities are indictable under § 168 of the Penal Code, and § 170 does not apply.[1] Hence a combination to drive plaintiff out of business because he will not join defendants in a combination to fix prices, is a combination for an illegal object, and if plaintiff is damaged by it he is entitled to recover.[2] It also follows that members of a combination, illegal under the Anti-Monopoly Act, are liable to one who is intentionally interfered with by the combination in the purchase of goods or the conduct of his business.[3]

III. *Lawful Means.* Assuming a justifiable motive (if that be necessary), it is not unlawful by persuasion, argument, and entreaty, accompanied by picketing, patrolling, or spying, to induce a breach of contract or the termination or non-formation of contract.[4]

Assuming a justifiable motive (if that be necessary), it is not unlawful to refuse to work with another, or to notify the common master of that fact, or to threaten to quit if that other is retained in the employment; and if as a consequence the obnoxious workman is discharged or fails to obtain employment, he has no action for the damages caused thereby.[5] Nor is it unlawful to refuse to deal with one who refuses to join in a lawful agreement as to the conduct of a particular business or who fails to

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[1] People *v.* Sheldon (1893), 139 N. Y. 251; People *v.* Milk Exchange (1895), 145 N. Y. 267; People *v.* Duke (1897), 19 N. Y. Misc. 292.

[2] Dueber Watchcase Co. *v.* Howard Watch Co. (1893), 3 N. Y. Misc. 582.

[3] L. 1899, c. 690; Rourke *v.* Elk Drug Co. (1902), 75 N. Y. App. Div. 145; Straus *v.* American Publishers' Ass'n (1904), 177 N. Y. 473.

[4] Ashley *v.* Dixon (1872), 48 N. Y. 430; Johnston Harvester Co. *v.* Meinhardt (1880), 60 How. Pr. (N. Y.) 168, 9 Abb. New Cas. 393; Rogers *v.* Evarts (1891), 17 N. Y. Supp. 264, aff'd *sub nom.* Reynolds *v.* Everett, 67 Hun (N. Y.) 294, 144 N. Y. 189; Sinsheimer *v.* United Garment Workers (1894), 77 Hun (N. Y.) 215; Daly *v.* Cornwell (1898), 34 N. Y. App. Div. 27; Reynolds *v.* Plumbers' Protective Ass'n (1900), 30 N. Y. Misc. 709, aff'd 53 N. Y. App. Div. 650; Collins *v.* American News Co. (1901), 34 N. Y. Misc. 260, aff'd 68 N. Y. App. Div. 639; Cohen *v.* United Garment Workers (1901), 35 N. Y. Misc. 748; National Protective Ass'n *v.* Cumming (1902), 170 N. Y. 315; Foster *v.* Retail Clerks' Protective Ass'n (1902), 39 N. Y. Misc. 48; Mills *v.* U. S. Printing Co., 91 N. Y. Supp. 185.

[5] Davis *v.* United Engineers (1898), 28 N. Y. App. Div. 396; Tallman *v.* Gaillard (1899), 27 N. Y. Misc. 114; Reform Club *v.* Laborers' Union (1899), 29 N. Y. Misc. 247; Wunch *v.* Shankland (1901), 59 N. Y. App. Div. 482; National Protective Ass'n *v.* Cumming (1902), 170 N. Y. 315.

Curran *v.* Galen (1897), 152 N. Y. 33; Connell *v.* Stalker (1897), 21 N. Y. Misc. 609; Coons *v.* Chrystie (1898), 24 N. Y. Misc. 296, must be distinguished on the ground of unjustifiable motive; Beattie *v.* Callanan (1903), 87 N. Y. App. Div. 7. Davenport *v.* Walker (1901), 57 N. Y. App. Div. 221, is of doubtful authority.

keep such agreement; nor is it unlawful to notify the other members of the association of such non-agreement or violation of agreement.[1]

Two Special Term decisions[2] are the first in New York to discuss broadly in the light of precedents the question of interference with contracts and business. They are both typical cases of striking employees who induce other employees to quit, and prospective employees not to enter, the plaintiff's employment, even paying money to some persons to refrain from entering the employment. The object in both was to resist a decrease in wages or to procure higher wages, and in one to procure the discharge of non-union workmen. There was either no sufficient evidence of intimidation or it was admitted that intimidation, if any, was lawful. In each, the question whether an injunction should issue against persuasion or picketing, or both, resulting in the enticement away of servants and the inability to procure servants, was answered in the negative. There was a denial of any remedy for the mere enticement of servants, and the interference with business was held to be justified upon the ground of competition. The affirmance of these judgments in the higher courts did not go in either case to the merits of the question.

The next step was taken when it was held that the issuing of circulars to the employer's customers requesting them not to deal with the employer until a dispute between him and the employees is adjusted, is not actionable, but is a lawful weapon in the competitive struggle concerning wages.[3]

Three decisions in cases involving no unlawful means seemed to cast some temporary doubt upon the reasoning and results

[1] Parks & Sons Co. *v.* National Druggist Ass'n (1903), 175 N. Y. 1. See also Collins *v.* American News Co. (1901), 34 N. Y. Misc. 260, aff'd 68 N. Y. App. Div. 639.

[2] Johnston Harvester Co. *v.* Meinhardt (1880), 60 How. Pr. (N. Y.) 168, 9 Abb. New Cas. 393, aff'd 24 Hun (N. Y.) 489; Rogers *v.* Evarts (1891), 17 N. Y. Supp. 264, aff'd *sub nom.* Reynolds *v.* Everett, 67 Hun (N. Y.) 294, 144 N. Y. 189. Justice Walter Lloyd Smith cites and discusses in this case the leading cases in other jurisdictions, such as Lumley *v.* Gye (2 E. & B. 216); Walker *v.* Cronin (107 Mass. 555); and Mogul Steamship Co. *v.* McGregor (L. R. 23 Q. B. D. 598).

[3] Sinsheimer *v.* United Garment Workers (1894), 77 Hun (N. Y.) 215. Followed in Cohen *v.* United Garment Workers (1901), 35 N. Y. Misc. 748; Foster *v.* Retail Clerks' Protective Ass'n (1902), 39 N. Y. Misc. 48. But a statement in the circular that plaintiff is insane and unfit to conduct business renders the interference actionable. Green *v.* Davis (1903), 83 N. Y. App. Div. 216. And a boycott which amounts to intimidation of plaintiff's patrons is unlawful. Matthews *v.* Shankland (1898), 25 N. Y. Misc. 604.

of these earlier cases. In one, the plaintiff having refused as treasurer of a union to surrender his books to a committee, the union to which he belonged adopted a resolution that the members refuse to work with him, and he was discharged by his employer in order to induce the other union men to resume work. This was held actionable, either because the case was really one for damages for wrongful exclusion from the union or because the motive for securing his discharge was unjustifiable.[1] In the second, the defendants caused the plaintiff's workmen to quit because the plaintiff would not join an employers' association. This was held actionable, either because the workmen were coerced into quitting by the anticipation of some penalty affixed by their union or because the motive was unjustifiable in that it was not to secure better wages for themselves but to force the plaintiff into joining an association.[2] In the third,[3] the defendants procured the plaintiff's discharge and prevented him from securing other employment because he would not join their union. The answer set up an agreement between the labor union and the employers' union to the effect that all employees should be members of the labor union, and that, in accordance with such agreement, the defendants had simply notified the employer that the plaintiff had refused to join the union. A demurrer to the answer was sustained upon the ground that the agreement to prevent a person from obtaining employment unless he would join a union was unlawful. It is to be noted, however, that in this case the complaint alleged that the defendants procured the plaintiff's discharge "by false and malicious reports in regard to him," and if this was sought to be justified by the answer, the demurrer to the answer should clearly be sustained, since such means cannot be justified at all unless, possibly, under a plea of privilege in analogy with the law of defamation. But these three decisions did not deflect the current of the authorities, and may be

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[1] Connell *v.* Stalker (1897), 21 N. Y. Misc. 609, aff'g 20 N. Y. Misc. 423.

[2] Coons *v.* Chrystie (1898), 24 N. Y. Misc. 296.

[3] Curran *v.* Galen (1897), 152 N. Y. 33, aff'g 77 Hun (N. Y.) 610. *Accord*, Jacobs *v.* Cohen (1904), 90 N. Y. Supp. 854. See also Davis Machine Co. *v.* Robinson (1903), 41 N. Y. Misc. 329, where the motive was to compel plaintiff to employ none but union men and picketing and persuasion were enjoined. This case reverts also to the old doctrine that it is unlawful to entice away servants. But compare Mills *v.* U. S. Printing Co., 91 N. Y. Supp. 185, where an agreement between an employer and a labor union that only union men should be employed was upheld as lawful. It is evident that motive is a material consideration in these apparently conflicting cases.

distinguished, perhaps, upon the ground that the motive in each case was thought to be an unjustifiable one.[1]

Following the decisions that it is not unlawful to persuade workmen to quit or not to enter another's employment, came a decision that it is not unlawful to notify the employer that the defendants will not work with the plaintiff under circumstances which naturally lead to the plaintiff's discharge.[2] The same question arose in the Court of Appeals and was decided in the same way by a vote of four to three.[3] The defendants' members refused to work with the plaintiff's members, and so notified the employer through the agency of a walking delegate. The result was to deprive the plaintiff's members of employment. The majority of the court thought that the defendants' conduct was justifiable, either because they desired the work for themselves or because they did not wish to assume the risk of the negligence of the plaintiff's members as fellow-servants. One of the majority distinguishes Curran *v.* Galen[4] on the ground that the object was there unlawful in seeking to compel the plaintiff to join the defendants' union. The minority think the defendants' conduct amounted to coercion, while admitting that mere persuasion would be lawful.

Another case in the Court of Appeals involved some features similar to those just discussed.[5] Wholesale druggists formed an association to prevent special rebates by manufacturers to favorite wholesalers. It was agreed by the wholesalers and manufacturers that the goods should be billed to the wholesalers at a

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[1] But in Wunch *v.* Shankland (1901), 59 N. Y. App. Div. 482, the motive was to compel the plaintiff to join the defendants' union, and a notice to the employer resulting in the plaintiff's discharge was held not to be actionable. This was decided upon the authority of Nat. Protective Ass'n *v.* Cumming, 53 N. Y. App. Div. 227.

[2] Davis *v.* United Engineers (1898), 28 N. Y. App. Div. 396. Followed in Tallman *v.* Gaillard (1899), 27 N. Y. Misc. 114; Reform Club *v.* Laborers' Union (1899), 29 N. Y. Misc. 247.

[3] National Protective Ass'n *v.* Cumming (1902), 170 N. Y. 315, aff'g 53 N. Y. App. Div. 227. See also Wunch *v.* Shankland (1901), 59 N. Y. App. Div. 482. The statement in Davenport *v.* Walker (1901), 57 N. Y. App. Div. 221, that the threat to strike unless higher wages were paid and only union workmen employed is unlawful, must be regarded as of doubtful authority in view of this and other decisions.

[4] 152 N. Y. 33.

[5] Park & Sons Co. *v.* National Druggists' Ass'n (1903), 175 N. Y. 1. See also Walsh *v.* Dwight (1899), 40 N. Y. App. Div. 513; Tanenbaum *v.* N. Y. Fire Ins. Exchange (1900), 33 N. Y. Misc. 134; Kellogg *v.* Sowerby (1904), 93 N. Y. App. Div. 124 (unjust discrimination by railway in combination with plaintiff's rivals). Cases that violate the Anti-Monopoly Act are to be distinguished. Straus *v.* Am. Pub. Ass'n (1904), 177 N. Y. 473.

uniform price fixed by each manufacturer, and those wholesalers who agreed to sell and did sell to retailers at the same price should have a rebate of ten per cent and freight charges, while those who would not agree or would not keep the agreement should get no rebate. The plaintiff would not agree and could not get the rebate. When he obtained goods of other jobbers, a committee which had spied on his business in order to ascertain who these dealers were, notified the manufacturers, who then withdrew the rebate privilege from such dealers. He was unable to get goods which he could sell at a profit in competition with members of the association. It was held that there were no illegal acts by any of the defendants. The jobbers were justified in refusing to deal with manufacturers who would not assent to the arrangement. The manufacturers were justified in refusing to sell to jobbers who would not assent to it. Any member was justified in notifying other members of the fact of the plaintiff's violation of the agreement, or the violation by any other jobber who furnished the goods to the plaintiff, and to this end was justified in keeping the necessary surveillance over the plaintiff's business. Persuasion, notification, picketing, were all lawful means in the competitive struggle. Three judges dissented on the ground of restraint of trade and coercion of the manufacturers by the wholesalers.

A recent case at Special Term[1] reviews fully the New York authorities and states clearly the conclusions to be drawn from them. The conclusions there stated seem to be entirely in accord with the authorities, unless possibly upon the question of motive or justification. In this case the defendants had no interest in the controversy except as sympathizers with the strikers, and the learned justice held that what would be lawful for the strikers would be lawful for any person since, in his view, motive or justification can make no difference in the result. Persuasion, picketing, and placarding are lawful means, and being lawful may be used by any person from any motive and without any color of justification. But a still later case hinges upon the question of motive or justification,[2] and that question is, therefore, one of the unsettled problems in the New York law.

IV. *Motive or Justification.* The problem of motive and justification in cases where no intrinsically unlawful means are used

[1] Foster *v.* Retail Clerks' Protective Ass'n (1902), 39 N. Y. Misc. 48, *per* Andrews, W. S., J.

[2] Davis Machine Co. *v.* Robinson (1903), 41 N. Y. Misc. 329, *per* Nash, J.

has been raised expressly or implicitly in several cases, but seems not yet to have been set at rest. Of course there can be no justification if unlawful means are used, unless in the case of a plea of privilege in defamation.

In Rogers *v.* Evarts[1] the difficulty is expressly recognized and the opposing views stated. It is held, however, that "in the case at bar the demand was for an increase of wages. There was no malice in the making of this demand. It was for an advantage in their business which they had the right to seek by all lawful means."

Curran *v.* Galen[2] distinctly recognizes that motive may be material. A unanimous court declares that if the purpose of an organization be to hamper or restrict the freedom of contract and to coerce workingmen to join the organization and come under its rules, under the penalty of the loss of their position, and of deprivation of employment, then that purpose seems clearly unlawful. The only coercion, it must be remembered, consists in persuading the employer to discharge the recalcitrant workingman. This distinction is expressly recognized by one of the majority judges in National Protective Association *v.* Cumming,[3] where it is pointed out that in Curran *v.* Galen the plaintiff was threatened with being discharged unless he joined the organization, while in this case "there is no such compulsion or motive. There is no malice found. The action was based upon a proper motive, relating to the employment of mechanics whose competency and efficiency had been examined into and approved," and to the securing of employment for members of the defendant organization. The other judge who writes for the majority calls attention to the rule "that intimates that if the motive be unlawful or be not for the good of the organization or some of its members, but prompted wholly by malice and a desire to injure others, then an act which would be otherwise legal becomes unlawful," and adds, "I do not assent to this proposition, although there is authority for it." Granting the existence of such a rule, however, he finds a good motive and sufficient justification in the desire to obtain work for the defendants' members and in their desire not to assume the risk of the negligence of fellow-servants whose

[1] 17 N. Y. Supp. 264.

[2] 152 N. Y. 33. See also Beattie *v.* Callanan, 87 N. Y. App. Div. 7, where the motive was to compel the plaintiff to recognize the union.

[3] 170 N. Y. 315, 334.

competency has not met the tests of the defendant organization. In the same case in the lower court[1] it is said that it would be illegal for the defendants to prevent the plaintiff from earning his livelihood because he would not join the defendant organization. "If that had been the purpose, and if that purpose had been accomplished, the plaintiff would have had a cause of action against those united in its accomplishment."

In Davis *v.* United Engineers,[2] one justice says: "If a case is presented in which the only motive which impels the interference is to prevent a particular individual from making his living, irrespective of other considerations, a court of equity will interfere where no adequate remedy at law exists. But that is not this case." Another says: "I have no doubt that an action will lie against a person who maliciously induces another to refuse to employ the plaintiff in his business, for the purpose of preventing the plaintiff from earning a livelihood thereby, if it appears that the plaintiff has suffered injury from such action." Still another writes: "The injury necessarily resulted from the success of one competitor in obtaining a contract or employment that others wished to obtain."

Other judicial statements are to the same effect. "A man may threaten to do that which the law says he may do, provided that, within the rules laid down in certain cases, his motive is to help himself. . . . The motive behind the action of each party is self-help."[3] "The acts of persons combining or confederating for the purpose of increasing their wages may be lawful, while combinations and acts which have for their object and purpose injury merely to the business of another, without any pecuniary advantage to the persons combining, may be unlawful."[4] "There is a manifest discrimination, well recognized, between a combination of workmen to secure the exclusive employment of its members by a refusal to work with none others, and a combination whose primary object is to procure the discharge of an outsider and his deprivation of all employment. . . . The difference is between

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[1] 53 N. Y. App. Div. 227, 236, 239.

[2] 28 N. Y. App. Div. 396.

[3] Park & Sons Co. *v.* Nat. Druggists' Ass'n, 175 N. Y. 1, 20, 21. See also Collins *v.* American News Co., 34 N. Y. Misc. 260.

[4] Davis Machine Co. *v.* Robinson, 41 N. Y. Misc. 329 (holds pickets and persuasion unlawful where there is no question of wages, but merely refusal of plaintiff to employ only union men and discard the premium system in his factory). See also Davenport *v.* Walker, 57 N. Y. App. Div. 221.

combination for welfare of self and that for the persecution of another. . . . Self-protection may cause incidental injury to another. Self-protection does not aim at malevolent injury to another. The law views an injury arising from competition differently from an injury done in persecution." [1]

Two or three cases seem to regard motive or justification as immaterial. "It is not unlawful interference with the trade of another to advise people to deal with his competitor or decline to do business with him. . . . The law does not ordinarily consider the motive by which people are actuated in doing lawful acts." [2] "The strike was a lawful act, whatever motives may have inspired it, so long as it was unaccompanied by violence, threats of violence, intimidation, or unlawful acts of coercion." [3] In a recent case two defendants had no interest, other than a sympathetic one, in a strike, but were picketing the plaintiff's store and persuading customers not to patronize him. The justice says: "They have not sufficient interest in the result to justify their act if their act requires justification." He puts the case of C, who advises his friend to patronize one physician rather than another, and proceeds: "It has been sometimes said that . . . if C advises or persuades his friend for the purpose of benefiting one or the other his act is rightful; but if simply for the purpose of injuring the physician it is illegal; if C has an interest to serve in giving his advice he has a right to give it, if not, he has none." He then gives Mr. Justice Holmes's views,[4] and after discussing the problem with much learning and acumen concludes: "It would always be a question of fact for the jury whether an act otherwise legal was committed with an evil intent. The step should not be taken unless justified by clear weight of authority, and I am not willing to hold that a request not to patronize a certain dealer may be legal if made by a person in one state of mind, or holding one relation to him, and illegal in another." [5]

At least four cases have been decided upon the question of

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[1] Mills *v.* U. S. Printing Co., 91 N. Y. Supp. 185.

[2] Reynolds *v.* Plumbers' Protective Ass'n, 30 N. Y. Misc. 709. But see Trapp *v.* Du Bois, 76 N. Y. App. Div. 314. These are cases of "black-listing," and are treated substantially as actions for libel.

[3] Herzog *v.* Fitzgerald, 74 N. Y. App. Div. 110.

[4] 8 HARV. L. REV. 1; dissenting opinion in Vegelahn *v.* Guntner, 167 Mass. 92, and in Plant *v.* Wood, 176 Mass. 492.

[5] Foster *v.* Retail Clerks' Protective Ass'n, 39 N. Y. Misc. 48, 53–55, *per* Andrews, W. S., J., at Special Term.

motive or justification. In one the motive was to punish the plaintiff for not delivering up certain books as treasurer, and this was held illegal.[1] In another the motive was to compel the plaintiff (employer) to join an association, and this was held illegal.[2] In a third the motive was to compel the plaintiff (employee) to join the defendants' association, and this was held illegal.[3] In still another, picketing was held illegal where the motive was to compel the plaintiff to employ only union men.[4] In many other cases the court has found the motive to be a justifiable one, and in several it is intimated that the result would be different if the motive were improper or unjustifiable.[5]

In the face of these decisions and *dicta*, it is difficult to escape the conclusion that, while the matter is by no means settled, the trend of opinion, and especially in the appeal courts, is decidedly toward making the question of motive or purpose a material one. But it is probable that the doctrine that "intentionally inflicting harm upon another is actionable, unless it is justified," does not mean in New York that the actor is put to his justification where he has used no unlawful means, but that where only means not unlawful *per se* are used the result is presumably lawful, and this presumption can be overcome only by proof of an unjustifiable motive. In other words, there is presumptively a privilege to employ any lawful means in social or industrial relations; argument, persuasion, and entreaty are lawful means; and the general and common privilege to employ these can be overcome only by showing that they are employed for an unjustifiable end, that is, an end which intentionally inflicts a damage upon a particular individual without a corresponding and compensating advantage to the one who inflicts it or to those whom he represents.

In one case it is said, "It must be assumed, in the absence of

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[1] Connell *v.* Stalker, 21 N. Y. Misc. 609.

[2] Coons *v.* Chrystie, 24 N. Y. Misc. 296.

[3] Curran *v.* Galen, 152 N. Y. 33. *Contra*, Wunch *v.* Shankland, 59 N. Y. App. Div. 482. See also Davenport *v.* Walker, 57 N. Y. App. Div. 221, decided upon the authority of Curran *v.* Galen. But compare Mills *v.* U. S. Printing Co., 91 N. Y. Supp. 185.

[4] Davis Machine Co. *v.* Robinson, 41 N. Y. Misc. 329. But this is probably not an unjustifiable motive by the weight of New York authority.

[5] Rogers *v.* Evarts, 17 N. Y. Supp. 264; Davis *v.* United Engineers, 28 N. Y. App. Div. 396; National Protective Ass'n *v.* Cumming, 53 N. Y. App. Div. 227, 170 N. Y. 315; Collins *v.* American News Co., 34 N. Y. Misc. 260; Park & Sons Co. *v.* National Druggists' Ass'n, 175 N. Y. 1; Mills *v.* U. S. Printing Co., 91 N. Y. Supp. 185.

specific allegations to the contrary, that the defendants' motive is a lawful one." [1] In another it is said: "Whenever the courts can see that a refusal of members of an organization to work with non-members may be in the interest of the several members, it will not assume, in the absence of a finding to the contrary, that the object of such refusal was solely to gratify malice and to inflict injury upon such non-members. . . . It must appear, in order to make out a cause of action against these defendants, that in what they did they were actuated by improper motives, by a malicious desire to injure the plaintiffs. . . . We may assume that the action of the respondents was based upon a proper motive." [2]

It must be noted that lawful means usually consist in some communication from the defendant to the person whose conduct is thereby influenced toward the plaintiff to the damage of the latter. Now, if that communication be not defamatory or false there can be no presumption of illegality; it is merely the exercise of a general privilege. If it be defamatory or false there is a presumption of illegality, but this may be overcome by proof of a special privilege, which, in turn, may be overcome by proof of unjustifiable motive. And somewhat as the special privilege is overcome by proof of unjustifiable motive, so the general privilege is overcome by similar proof. Two cases bring out clearly the situation so far as a special privilege is involved.[3]

While it is manifestly unsafe to attempt to deduce a general principle from the special doctrines of defamatory or false statements, it is at least allowable to use such examples by way of analogy and illustration. The general privilege to use persuasion and argument and the means incidental to these, is not to be regarded as absolute, but conditional. When they are used with the intent to inflict damage upon another, and damage is inflicted, it is permissible for the injured person to show that this was done from an unjustifiable motive, and so overcome the presumption of privilege.

Motive is not, perhaps, the best term to use in this connection. It is too often identified with ill-will or good-will, with bad motive or good motive in the moral sense. But malevolence may not render conduct actionable, nor benevolence render it non-action-

[1] Collins *v.* American News Co., 34 N. Y. Misc. 260, 263.

[2] National Protective Ass'n *v.* Cumming, 170 N. Y. 315, 322, 331, 334.

[3] Reynolds *v.* Plumbers' Protective Ass'n (1900), 30 N. Y. Misc. 709; aff'd without opinion in 53 N. Y. App. Div. 650; Trapp *v.* Du Bois (1902), 76 N. Y. App. Div. 314.

able. A rival trader may have all the malice imaginable against his competitor, and yet be justified in inducing persons not to deal with him. One may act with benevolence toward A and no malevolence toward B, and yet not be justified in inducing persons not to deal with B in order to benefit A. "Want of justification" is, after all, about as apt a phrase as has yet been suggested to convey the idea involved in these cases, although "abuse of privilege" would not be inappropriate. The problem reduced to its simplest terms is whether or not the end justifies the means. For it is the ultimate object that must be kept in mind. The inflicting of damage by persuading persons not to deal with another is very rarely an end in itself. In a sense this is only a means to another end. The gratification of feelings, whether of ill-will or good-will, may be the end sought and accomplished. The securing of a substantial advantage to one's self or to one's organization or to one's friend may be the appointed end. The question of justification resolves itself into this, — does the desire and expectation of accomplishing this particular end warrant the interference with the contracts or business of one who stands in the way of its accomplishment?

If that end be only the gratification of feeling, whether of ill-will or good-will, it is not of that substantial character which justifies inflicting pecuniary loss upon another. To gratify a feeling of malice toward the plaintiff will hardly be thought a justification for inducing third persons not to deal with him. To gratify a feeling of sympathy or good-will toward X will hardly justify inducing third persons not to deal with the plaintiff, unless there be some special relation between X and the defendant which warrants the defendant in acting for X. Even the remote advantage the defendant might derive as one of a large class from the success of X in a competitive struggle with the plaintiff would not be sufficient.[1]

Remoteness of result has a double aspect. In an action based upon unlawful means the plaintiff may fail because the resulting injury to him is too remote. A plaintiff is engaged by the X Insurance Co. upon an agreement that he shall secure an employee's surety bond from the Y Guaranty Co. He applies to the guaranty company for a bond and refers to the defendant. The latter makes a false and malicious statement to the guaranty company about him,

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[1] If motive is material the decision cannot therefore be sustained in Foster *v.* Retail Clerks' Protective Ass'n, 39 N. Y. Misc. 48.

and the company refuses to give the bond. He is unable to retain his place with the X Co., and brings an action against the defendant for the damages occasioned by the false statement. The damage is held to be too remote from the defendant's tort, because, "between the wrong of the defendant and the damage to the plaintiff, the voluntary act of a third party intervened, and that act was the proximate cause of plaintiff's loss of employment. The insurance company did not discharge plaintiff because of defendant's slander — *non liquet* that the company knew of the slander — but because of the failure of the guarantee company to supply the security." [1] So also, in an action based upon lawful means, the defendant may fail of justification because the end which he alleges justifies the means is too remote to be considered, as where he desires to have his employer join an association with which his union has some agreement, or where he wishes to have an employee join an association of which he is a member.[2]

It appears, therefore, that even a substantial and lawful end may not warrant the use of the particular means not adapted to the accomplishment of that end. This is familiar doctrine in the tort known as "abuse of process." [3] It is also applicable to this tort of "interference with contract." A common and general privilege extended by the law for justifiable ends may be abused by employing it for unjustifiable ends. Thus where the defendant induces an employer to discharge the plaintiff because the latter will not deliver up certain books and accounts to his union, there has been such an abuse of privilege, and the end does not justify the means.[4]

Barring a particular relation which might create a privilege, the general relation which creates it in this class of cases is that of competition. Given a competitive struggle in the large sense between the plaintiff and the defendant and an interference by persuasion with the plaintiff's contracts for the purpose of securing to the defendant a substantial and not too remote advantage in that competition, the end will be held to justify the means. But because the end justifies the means in such cases, it does not follow that the

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[1] McDonald *v.* Edwards, 20 N. Y. Misc. 523. See also Davis *v.* United Engineers, 28 N. Y. App. Div. 396.

[2] Coons *v.* Chrystie, 24 N. Y. Misc. 296; Curran *v.* Galen, 152 N. Y. 33.

[3] Dishaw *v.* Wadleigh (1897), 15 N. Y. App. Div. 205; Foy *v.* Barry (1903), 87 N. Y. App. Div. 291.

[4] Connell *v.* Stalker, 21 N. Y. Misc. 609.

end justifies the means in cases in which there is no such competition, or in cases where the means are not reasonably adapted to the accomplishment of the end. Motive, therefore, in the sense in which that term is here used, must continue to be an important element in the decision of cases dealing with the interference with contracts and business by persuasion and its incidental aids.

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